Office - Supreme Court, U. S.
FILED
JUL 29 1942
CHARLES ELMORE CROPLEY
CLERK

No. 177

In the Supreme Court of the United States

OCTOBER TERM, 1942

MARY E. WENGER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	5
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Altmaier v. *Commissioner*, 116 F. (2d) 162, certiorari denied, 312 U. S. 706	7
Commissioner v. *Caspersen*, 119 F. (2d) 94, certiorari denied, 314 U. S. 643	7
Fulham v. *Commissioner*, 110 F. (2d) 916	7
Helvering v. *Evans*, 126 F. (2d) 270	7
Morton v. *Commissioner*, 109 F. (2d) 47	7
Reinecke v. *Smith*, 289 U. S. 172	7
Stuart v. *Commissioner*, 124 F. (2d) 772, certiorari granted April 27, 1942, Nos. 48 and 49, present term	7
White v. *Higgins*, 116 F. (2d) 312	7
Statute:	
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Section 166	9
Section 167	9
Miscellaneous:	
H. Rep. No. 708, 72nd Cong., 1st Sess., p. 25 (1939–1 Cum. Bull. (Part 2) 457, 474–475)	7
S. Rep. No. 665, 72nd Cong., 1st Sess., pp. 34–35 (1939–1 Cum. Bull. (Part 2) 496, 520–521)	7
Treasury Regulations 86:	
Article 166–1	10
Article 167–1	12

473770—42——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 177

MARY E. WENGER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 92–93) is reported at 127 F. (2d) 523. The opinion of the Board of Tax Appeals (R. 57–70) is reported at 42 B. T. A. 225.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 7, 1942 (R. 92–93). The petition for a writ of certiorari was filed June 24, 1942, and notice was served July 7, 1942. The jurisdic-

tion of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the income of a trust created by the petitioner for the benefit of herself and her children is taxable to the petitioner under Section 166 or 167 of the Revenue Act of 1934. The question depends upon whether the trustee, who is petitioner's nephew and adviser and not a beneficiary, has a substantial adverse interest in the disposition of the income or corpus by reason of his fiduciary obligations to petitioner's children.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and regulations involved are set forth in the Appendix, *infra,* pp. 9–13.

STATEMENT

Petitioner is the widow of Emil P. Wenger who died testate June 2, 1916, survived by petitioner and their four children. Petitioner and the four children are beneficiaries of trusts created for them by the will of Emil P. Wenger (R. 59).

On January 3, 1932, petitioner, who then was sixty-two years of age, executed a deed of trust (R. 37–47) conveying to her nephew and adviser, A. W. Wenger, as trustee, certain securities having a value of approximately $400,000. The stated

purpose of the trust was to provide means which would be available for alleviating the needs and wants of petitioner and her children in the event that their income from the trusts created by petitioner's husband were reduced or in the event of other contingencies (R. 38–40). Full powers of management were granted the trustee, but neither he nor anyone else had the power to change the beneficiaries. The trust was to continue for fifteen years and six months unless terminated sooner by the mutual consent of petitioner, her four children, and the trustee or his successor; by mutual consent of petitioner, the survivors or survivor of her children, and the trustee or his successor; by the death of all of her children prior to the time fixed for the termination of the trust; or, under certain circumstances, by the death of petitioner prior to the date specified for the termination of the trust (R. 41–42). Upon termination of the trust the corpus and undistributed income were to be paid in equal shares to all or some of the beneficiaries, depending upon the manner of termination (R. 43–45).

If during the life of the trust any of the children suffered losses in the investment of funds received from their father's estate and if certain other conditions were met, the trustee was directed to pay such beneficiary or beneficiaries enough out of the trust to enable the losses to be recouped (R. 42–43). In addition, the trust

(Paragraph G (1)) contained the following provision (R. 42):

> In the event any accident, sickness, calamity, misfortune, adversity, bereavement or loss, financially or otherwise, shall visit, overtake or befall the maker hereof and/or any of her children, or their descendants, then and in that event the said Trustee may distribute to such beneficiary or beneficiaries hereof, upon her, his or their written request or requests, such sum or sums which in the discretion of said Trustee, will be sufficient to alleviate, aid and relieve such beneficiary or beneficiaries from such misfortune or happening.

It was specified that in making such distributions the trustee had authority to encroach upon the corpus of the trust "should the income be insufficient at such time for the purposes set forth and the gravity of the situation demands that the aid be furnished" (R. 43).

The trust (Paragraph G (3)) also provided (R. 43):

> In the event the earnings, income, rents, receipts and profits received by the Trustee, during any year, are sufficient in amount so that in the judgment of said Trustee it would be advisable to make a distribution of part or all of such surplus income, the Trustee shall be authorized to pay out and distribute all, or any part thereof, to the beneficiaries hereof in the following propor-

> tions; One-half of any sum determined upon to be distributed, to the maker hereof, Mary E. Wenger; and the other half equally between my children * * *

At the time of the present suit all of the income of the trust had been accumulated and none had been distributed (R. 61). The Commissioner of Internal Revenue added to petitioner's reported income for 1934 and 1935 the income of the trust during those years and determined deficiencies in the respective amounts of $2,350.04 and $4,430.85 (R. 16–26). These deficiencies were determined without giving effect to certain losses sustained by the trust which petitioner claimed should be allowed as deductions in computing her net taxable income if the trust income was taxable to her (R. 61).

The Board of Tax Appeals held that the income of the trust was taxable to petitioner for the years involved. After ordering adjustment for deductible losses sustained by the trust in those years, it redetermined deficiencies in the respective amounts of $1,181.28 and $3,268.51 (R. 57–70). The Circuit Court of Appeals for the Sixth Circuit affirmed the Board's decision (R. 92–93).

ARGUMENT

Section 166 of the Revenue Act of 1934 (Appendix, *infra*, p. 9) provides that the income of a trust shall be taxed to the grantor where at any

time, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the corpus or income therefrom, he has power to revest the title to the corpus in himself, or where such power is vested in another person not having any such substantial adverse interest.

The Board and court below both held petitioner taxable under this section.[1] They concluded first that the wording of Paragraph G (1) (*supra*, p. 4) of the trust here involved was sufficiently broad to permit petitioner, with the acquiescence of her nephew as trustee, to use the income and if necessary the corpus for needs for which she normally would have used the property had no trust been created. Secondly, they concluded that petitioner's nephew as trustee had no substantial adverse interest in the disposition of the income or corpus (R. 65, 67–68, 92–93).

Petitioner does not now question the propriety of the first of the foregoing conclusions, but contends (Pet. 7, 12–14) only that her nephew as trustee did have a substantial adverse interest sufficient to render Section 166 inapplicable. This

[1] The Board also held (R. 65) that independently of Section 166 petitioner was taxable on one-half of the income from the trust under Section 167 of the Act (Appendix, *infra*, pp. 9–10) in view of the provisions of Paragraph G (3) (*supra*, pp. 4–5) of the trust empowering the trustee to distribute one-half of the income to petitioner. The court below did not discuss the point but held Section 167, as well as Section 166, applicable (R. 93).

contention is based solely on the ground that as trustee he owed certain fiduciary duties to protect the interests of the children as well as those of petitioner, the other beneficiary, and that their interests were opposed to those of petitioner in that payments to petitioner would reduce the amount available for payment to the children. Such an argument, however, could be made with respect to any trustee, whereas it is settled that a trustee has a "substantial adverse interest" only if he is himself a beneficiary or has some other direct personal interest adverse to that of the settlor. *Commissioner* v. *Caspersen,* 119 F. (2d) 94 (C. C. A. 3), certiorari denied, 314 U. S. 643; *Altmaier* v. *Commissioner,* 116 F. (2d) 162 (C. C. A. 6), certiorari denied, 312 U. S. 706; *Morton* v. *Commissioner,* 109 F. (2d) 47, 51 (C. C. A. 7); *Fulham* v. *Commissioner,* 110 F. (2d) 916, 918 (C. C. A. 1). Cf. *Reinecke* v. *Smith,* 289 U. S. 172; *Helvering* v. *Evans,* 126 F. (2d) 270 (C. C. A. 3); *White* v. *Higgins,* 116 F. (2d) 312, 318 (C. C. A. 1).[2]

The trustee in this case was not a beneficiary and had no other direct personal interest in the corpus or income adverse to that of petitioner. Nor did he have the power to change the beneficiaries. For this reason the decision of the

[2] See also H. Rep. No. 708, 72nd Cong., 1st Sess., p. 25 (1939–1 Cum. Bull. (Part 2) 457, 474–475) and S. Rep. No. 665, 72nd Cong., 1st Sess., pp. 34–35 (1939–1 Cum. Bull. (Part 2) 496, 520–521).

court below does not conflict with *Stuart* v. *Commissioner,* 124 F. (2d) 772 (C. C. A. 7), certiorari granted April 27, 1942, Nos. 48 and 49, present Term. The trust instrument in that case gave the trustees the right to change the beneficiaries and the court held (p. 777) that if they had the power to substitute themselves as beneficiaries they were adversely interested. The court did not hold that in the absence of such a power the fiduciary obligations of the trustees toward the beneficiaries other than the settlor were alone sufficient to give the trustees a substantial adverse interest, and, so far as we are aware, no other court has reached such a result.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

OSCAR COX,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
GERALD L. WALLACE,
F. E. YOUNGMAN,
Special Assistants to the Attorney General.

JULY 1942.